

**Before the
Federal Communications Commission
WASHINGTON, D.C. 20554**

In the Matter of)	
)	File No.: EB-10-SE-075
SmartLabs, Inc.)	NAL/Acct. No.: 201132100030
)	FRN: 0011200474

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: June 1, 2011**Released: June 1, 2011**

By the Acting Chief, Spectrum Enforcement Division, Enforcement Bureau:

I. INTRODUCTION

1. In this *Notice of Apparent Liability for Forfeiture* (“NAL”), we find SmartLabs, Inc. (“SmartLabs”) apparently liable for a forfeiture in the amount of ten thousand dollars (\$10,000) for willful and repeated violations of section 302(b) of the Communications Act of 1934, as amended (“Act”),¹ and section 2.803(a)(1) of the Commission’s rules (“Rules”).² The apparent violations involve SmartLabs’ marketing of an unauthorized radio frequency device.

II. BACKGROUND

2. By letter of inquiry (“LOI”) dated May 21, 2010, the Enforcement Bureau’s Spectrum Enforcement Division (“Division”) initiated an investigation into whether SmartLabs had marketed the INSTEON® RemoteLinc™ Wireless Remote Control Model #2440 (“RemoteLinc”) prior to authorization of this device in accordance with the Commission’s equipment authorization requirements.³ Information before the Division indicated that the RemoteLinc was labeled with FCC Identification number (“FCC ID”) SBP2440, an FCC ID that was not found in the FCC’s equipment authorization database.

3. SmartLabs responded to the LOI on June 17, 2010.⁴ In its LOI Response, SmartLabs indicated that it began manufacturing and marketing the RemoteLinc in the United States with a label specifying the FCC ID as SBP2440 in May 2007.⁵ SmartLabs also indicated that, within the past year, it sold units of its RemoteLinc in the United States.⁶ SmartLabs stated that after receiving the LOI, it

¹ 47 U.S.C. § 302a(b).

² 47 C.F.R. § 2.803(a)(1).

³ See Letter from Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission, to Dan Cregg, Vice President Engineering, SmartLabs, Inc. (May 21, 2010).

⁴ See Letter from John Lockyer, Senior Product Development Manager, SmartLabs, Inc. to Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission (June 17, 2010) (“LOI Response”).

⁵ LOI Response at 3-4.

⁶ *Id.* at 3. SmartLabs requested confidential treatment of the number of units of the RemoteLinc sold in the United States, the dates SmartLabs received shipments of these devices in the United States, and information regarding the (continued....)

determined that the RemoteLinc was not listed in the FCC's equipment authorization database and that it did not have a grant of certification when it began marketing the device.⁷ According to SmartLabs, around the time the RemoteLinc was nearing completion of testing and ready for sale, several key technical, project management, and executive leadership employees directly involved with the project left the company.⁸ SmartLabs asserted that the new team did not adequately understand the testing process and erroneously believed that once the device passed the lab testing, the company could start shipping the product and that the grant of certification would come later.⁹ SmartLabs also asserted that its testing lab informed it that the certification process stalled "due to administrative issues."¹⁰ SmartLabs stated that its testing lab has subsequently supplied the original test report (dated June 6, 2007) and confirmed that the RemoteLinc met all applicable technical requirements.¹¹ Finally, SmartLabs indicated that it received a grant of equipment certification for the RemoteLinc under FCC ID SBP2440 on June 3, 2010.¹²

III. DISCUSSION

A. Marketing of Unauthorized Equipment

4. Section 302(b) of the Act provides that "[n]o person shall manufacture, import, sell, offer for sale, or ship devices or home electronic equipment and systems, or use devices, which fail to comply with regulations promulgated pursuant to this section." Section 2.803(a)(1) of the Rules provides that:

Except as provided elsewhere in this section, no person shall sell or lease, or offer for sale or lease (including *advertising* for sale or lease), or import, ship, or distribute for the purpose of selling or leasing or offering for sale or lease, any radio frequency device¹³ unless ... [i]n the case of a device that is subject to certification, such device has been authorized by the Commission in accordance with the rules in this chapter and is properly identified and labeled as required by § 2.925 and other relevant sections in this chapter [*emphasis added*].

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devices returned to SmartLabs pursuant to section 0.459 of the Rules, 47 C.F.R. § 0.459. *See* Letter from John Lockyer, Senior Product Development Manager, SmartLabs, Inc., to Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission (June 17, 2010) ("Request for Confidentiality"). We need not disclose this information in the context of this particular *NAL*, and consequently will defer action on the Request for Confidentiality. *See* 47 C.F.R. § 0.459(d)(3).

⁷ LOI Response at 1, 6.

⁸ *Id.* at 6.

⁹ *Id.*

¹⁰ *Id.* at 2.

¹¹ *Id.*

¹² *Id.* at 2. We note that this grant applies to devices manufactured and marketed by SmartLabs beginning June 3, 2010 and does not negate any equipment marketing violations by SmartLabs prior to that date.

¹³ 47 C.F.R. § 2.801 defines a radiofrequency device as "any device which in its operation is capable of emitting radiofrequency energy by radiation, conduction, or other means."

As an intentional radiator,¹⁴ the RemoteLinc is required by section 15.201(b) of the Rules¹⁵ to be approved prior to marketing through the equipment certification¹⁶ procedures described in sections 2.1031 – 2.1060 of the Rules.¹⁷

5. SmartLabs admits that it manufactured and marketed units of its RemoteLinc device in the United States within the past year. It appears that these violations were repeated since SmartLabs indicates that the marketing of these devices has continued since May 2007. SmartLabs further admits that the device was not certified prior to marketing in the United States. Accordingly, we find that SmartLabs apparently marketed¹⁸ an uncertified radio frequency device in willful¹⁹ and repeated²⁰ violation of section 302(b) of the Act and section 2.803(a)(1) of the Rules.

B. Proposed Forfeiture

6. Section 503(b) of the Act authorizes the Commission to assess a forfeiture for each willful or repeated violation of the Act or of any Rule, regulation, or order issued by the Commission under the Act.²¹ In exercising such authority, we are required to take into account “the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.”²²

¹⁴ An intentional radiator is “[a] device that intentionally generates and emits radio frequency energy by radiation or induction.” 47 C.F.R. § 15.3(o).

¹⁵ 47 C.F.R. § 15.201(b).

¹⁶ A certification is an equipment authorization issued by the Commission, based on representations and test data submitted by the applicant. *See* 47 C.F.R. § 2.907(a).

¹⁷ 47 C.F.R. §§ 2.1031 – 2.1060.

¹⁸ Marketing, as defined in 47 C.F.R. § 2.803(e)(4), “includes sale or lease, or offering for sale or lease, including advertising for sale or lease, or importation, shipment, or distribution for the purpose of selling or leasing or offering for sale or lease.”

¹⁹ Section 312(f)(1) of the Act, 47 U.S.C. § 312(f)(1), which applies to violations for which forfeitures are assessed under section 503(b) of the Act, provides that “[t]he term ‘willful’, ... means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act” *See Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991) (“*Southern California*”); *see also Telrite Corporation*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 7231, 7237 (2008); *Regent USA*, Notice of Apparent Liability for Forfeiture, 22 FCC Rcd 10520, 10523 (2007); *San Jose Navigation, Inc.*, Forfeiture Order 22 FCC Rcd 1040, 1042 (2007).

²⁰ Section 312(f)(2) of the Act provides that “[t]he term ‘repeated’, ... means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.” 47 U.S.C. § 312(f)(2). *See, e.g., Callais Cablevision, Inc., Grand Isle, Louisiana*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359, 1362 (2001) (“*Callais Cablevision*”) (issuing a Notice of Apparent Liability for, *inter alia*, a cable television operator’s repeated signal leakage).

²¹ 47 U.S.C. § 503(b).

²² 47 U.S.C. § 503(b)(2)(E). *See also* 47 C.F.R. § 1.80(b)(4), Note to paragraph (b)(4): Section II. Adjustment Criteria for Section 503 Forfeitures.

7. Pursuant to the Commission's *Forfeiture Policy Statement*²³ and section 1.80 of the Rules,²⁴ the base forfeiture amount for the marketing of unauthorized equipment is \$7,000. The Commission has found that the marketing of each separate unauthorized or non-compliant model constitutes a separate violation subject to the \$7,000 base forfeiture amount.²⁵ Section 503(b)(2)(D) of the Act authorizes the Commission to assess a maximum forfeiture of \$16,000 for each violation, or each day of a continuing violation, up to a statutory maximum forfeiture of \$112,500 for any single continuing violation.

8. The record establishes that within the past year, SmartLabs marketed one model of an uncertified radio frequency device within the United States. Consequently, we begin with a base forfeiture of \$7,000 for SmartLabs' marketing of one model of an authorized radio frequency device. That base forfeiture amount is, however, subject to an upward adjustment.

9. Having considered the statutory factors enumerated above, we conclude that an upward adjustment of the base forfeiture amount is warranted. We find that the violations in this case are particularly troubling given their nature and extended duration. We note that by failing to exercise appropriate diligence and marketing the RemoteLinc device with a label specifying an FCC ID that was not found in the FCC's equipment authorization database, SmartLabs incorrectly led consumers to believe that its device had received the necessary FCC certification. Thus, SmartLabs' marketing of its RemoteLinc device affirmatively misled consumers. Moreover, we take into account the fact that SmartLabs' violations have continued for more than three years.²⁶

10. Accordingly, we propose a forfeiture of \$10,000 for SmartLabs' apparent willful and repeated violation of section 302(b) of the Act and section 2.803(a)(1) of the Rules. We conclude that no mitigating factors have been presented warranting a downward adjustment of the proposed forfeiture. SmartLabs explained that it lacked understanding of the Commission's equipment authorization procedures and failed to follow up with its testing lab when the certification process for the RemoteLinc stopped. We do not believe that these circumstances warrant any downward adjustment of the proposed forfeiture amount. It is well established that a violator's lack of knowledge or erroneous beliefs are not a mitigating factor warranting a forfeiture reduction.²⁷ Accordingly, we conclude that SmartLabs is

²³ *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997), *recon. denied* 15 FCC Rcd 303 (1999).

²⁴ 47 C.F.R. § 1.80.

²⁵ *See, e.g., Behringer*, 21 FCC Rcd at 1827; *ACR Electronics, Inc.*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 22293, 22302 (2004), *forfeiture ordered*, 21 FCC Rcd 3698 (2006); *Samson Technologies, Inc.*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 4221, 4225 (2004), *consent decree ordered*, 19 FCC Rcd 24509 (2004).

²⁶ Consistent with section 503(b)(6) of the Act, 47 U.S.C. § 503(b)(6), we may consider the fact that SmartLabs' misconduct occurred over an extended period to place "the violations in context, thus establishing the [company's] degree of culpability and the continuing nature of the violations. *See e.g., Roadrunner*, 15 FCC Rcd at 9671-72 (considering the fact the violations began in 1996 to establish the context for determining an appropriate forfeiture amount for the violations that were subject to a forfeiture from June 1, 1998 forward). Thus, while we may consider the fact that SmartLabs' conduct commenced more than one year ago, the forfeiture amount we propose herein relates only to SmartLabs' apparent violations that have occurred within the past year.

²⁷ *See, e.g., Profit Enterprises, Inc.*, 8 FCC Rcd 2846, 2846 (1993) (denying the mitigation claim of a manufacturer/distributor who thought that the equipment certification and marketing requirements were inapplicable, stating that its "prior knowledge or understanding of the law is unnecessary to a determination of whether a violation existed ... ignorance of the law is [not] a mitigating factor"); *Lakewood Broadcasting Service, Inc.*, 37 FCC 2d 437, (continued....)

apparently liable for a \$10,000 forfeiture for marketing an uncertified radio frequency device in willful and repeated violation of section 302(b) of the Act and section 2.803(a)(1) of the Rules.

IV. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED** that, pursuant to section 503(b) of the Act and sections 0.111, 0.311, and 1.80 of the Commission's Rules,²⁸ SmartLabs, Inc., is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR A FORFEITURE** in the amount of ten thousand dollars (\$10,000) for marketing an uncertified radio frequency device in willful and repeated violation of section 302(a) of the Act and section 2.803(a)(1) of the Rules.

12. **IT IS FURTHER ORDERED** that, pursuant to section 1.80 of the Commission's rules within thirty (30) days after the release date of this *Notice of Apparent Liability for Forfeiture*, SmartLabs, Inc., **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

13. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Account Number and FRN referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters “FORF” in block number 24A (payment type code). Requests for full payment under an installment plan should be sent to: Chief Financial Officer -- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554. Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov with any questions regarding payment procedures. SmartLabs, Inc. will also send electronic notification on the date said payment is made to Kathy Harvey at Kathy.Harvey@fcc.gov and to Neal McNeil at Neal.McNeil@fcc.gov.

14. The written statement seeking reduction or cancellation of the proposed forfeiture, if any, must include a detailed factual statement supported by appropriate documentation and affidavits pursuant to sections 1.80(f)(3) and 1.16 of the Rules. The written statement must be mailed to the Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554, ATTN: Enforcement Bureau – Spectrum Enforcement Division, and must include the NAL/Acct. No. referenced in the caption. The statement should also be emailed to Kathy Harvey at Kathy.Harvey@fcc.gov and Neal McNeil at Neal.McNeil@fcc.gov.

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438 (1972) (denying the mitigation claim of a broadcast licensee who asserted an unfamiliarity with the station identification requirements, stating that licensees are expected “to know and conform their conduct to the requirements of our rules”); *Kenneth Paul Harris, Sr.*, 15 FCC Rcd 12933, 12935 (Enf. Bur. 2000) (denying a mitigation claim of a broadcast licensee, stating that its ignorance of the law did not excuse the unauthorized transfer of the station); *Maxwell Broadcasting Group, Inc.*, 8 FCC Rcd 784, 784 (MMB 1993) (denying a mitigation claim of a noncommercial broadcast licensee, stating that the excuse of “inadverten[ce], due to inexperience and ignorance of the rules ... are not reasons to mitigate a forfeiture” for violation of the advertisement restrictions).

²⁸ 47 U.S.C. § 503(b), 47 C.F.R. §§ 0.111, 0.311, 1.80.

15. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

16. **IT IS FURTHER ORDERED** that a copy of this *Notice of Apparent Liability for Forfeiture* shall be sent by Certified Mail, Return Receipt Requested, and regular mail, to Dan Cregg, Vice President Engineering, SmartLabs, Inc., 16542 Millikan Avenue, Irvine, CA 92606.

FEDERAL COMMUNICATIONS COMMISSION

John D. Poutasse
Acting Chief, Spectrum Enforcement Division
Enforcement Bureau